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In the

Supreme Court of the United States.

October Term, 1904.

No. 220.
(File No. 530.)

JOHN M. MARSHALL, as Executor of the Peru National Bank, of Peru, Nebraska,
Appellant,
vs.
THEODORE DENNEY and THEODORE T. MILLER, as Executors of the Last Will and Testament of Charles P. Denney,
Appellees.

Appeal and Cross Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLEES.

JOHN F. WILSON,
NATHAN G. MOORE,
WILLIAM R. McKEVENE,
Counsel for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 220.

(Vide No. 530.)

JOHN W. McDONALD, as Receiver of the First National Bank of Orleans, Nebraska, *Appellant,* *vs.* **CHAUNCEY DEWEY and CHARLES T. KILLEN, as Executors of the Last Will and Testament of Charles P. Dewey,** *Appellees.*	Appeal and Cross Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT.

This case involves the liability of the estate of Charles P. Dewey to respond to an assessment by the comptroller of the currency of $86 a share upon 105 shares of the capital stock of the First National Bank of Orleans, Nebraska. All of the 105 shares were sold, out and out, by Dewey in the months of December, 1894, and January, 1895. Eighty shares were duly transferred upon the books of the bank within a few weeks after the sale. The remaining twenty-five shares had been previously transferred by Dewey to his agent,

Frederick L. Jewett, and stood upon the books of the bank in the name of Jewett when the bank went into the hands of a receiver on or about the 20th of May, 1897, although they had been sold by Dewey.

The bank continued as a going concern for about two years and five months after Dewey had sold his stock out and out. No question is raised on the record as to the good faith of the sales as between Dewey and his vendees. After the sales were completed Dewey retained no interest of any kind in the stock.

The Circuit Court found that "the bank was insolvent in December, 1894, and January, 1895, at the time Dewey sold his 105 shares of stock in this proceeding, and that *Dewey knew or ought to have known* that fact and that he cannot escape his stockholder's liability for debts of the bank owing at the time he sold his stock and not discharged at the time of the bank's failure." (Rec., 275.)

The Circuit Court further found "that except as to the debts due from the bank over and above its valid assets no one was interested in Dewey's motives or acts with reference to his stock, *since no evidence has been introduced tending to show any fraud upon the creditors;* the liability sought here to be enforced against Dewey is simply that implied in his ownership of said stock; that *being charged with knowledge of the bank's insolvent condition* the sale and transfer of his stock to some other party did not release him from his liability for the bank's then existing debts; the transfer was void as to creditors representing indebtedness of the bank then in existence but not as to subsequently accruing indebtedness." (Rec., 275.)

The Circuit Court therefore entered a decree for Dewey's ratable share of the debts of the bank which were in existence at the time of the transfer of his stock, and which were unpaid at the time the bank went into the hands of a receiver. The amount of the decree was $585.48. (Rec., 278.)

There was no finding by the Circuit Court that Dewey had transferred his stock with intent to relieve himself from stock liability or with intent to defraud the creditors of the bank.

No error was assigned in the Circuit Court of Appeals upon the findings of fact mentioned, nor was it assigned for error that the court had erred in not finding that Dewey's transfer was made with fraudulent intent, to relieve himself from stock liability. (Rec., 280.)

The Circuit Court of Appeals reversed the decree and directed a decree against Dewey upon 25 shares. A cross appeal had been prayed from the original decree by Dewey and a further cross appeal has been prayed by his executors to this court.

The following cross errors have been assigned:

IN THE COURT OF APPEALS.

1st. The court erred in finding as a fact from the evidence adduced that the First National Bank of Orleans, Nebraska, was insolvent in December, 1894, and January, 1895, at the time the respondent Charles P. Dewey sold his one hundred and five shares of stock in said bank in question in this proceeding, and that this respondent Charles P. Dewey knew, or ought to have known of such insolvency, and that this respondent is liable upon his stockholder's liability for the

debts of the bank owing at the time he sold his stock and not discharged at the time of the bank's failure.

2nd. The court erred (in the absence of affirmative evidence by the complainant, and finding by the court, that the respondent's transferrees were financially irresponsible, when said stock was sold and transferred to them) in holding that said sale and transfer of the respondent's stock did not release this respondent from the statutory liability for the said bank's then existing debts and that said transfers were void as to creditors representing indebtedness of the said bank then in existence.

3rd. The court erred in finding that said bank was insolvent in December, 1894, and January, 1895, notwithstanding that the uncontradicted evidence shows that said bank continued as a going concern in the ordinary course of business until May 20, 1897, two years and five months thereafter. (Rec. Cross. App., 4.)

IN THE SUPREME COURT.

1. Said Circuit Court of Appeals erred in finding and adjudging that Charles P. Dewey was liable for the full assessment of $86 per share on twenty-five shares of the stock of the First National Bank of Orleans, Nebraska, and in reversing the decree in said cause and remanding said cause to the United States Circuit Court for the Northern District of Illinois with directions to enter a decree against said Dewey for the amount of said assessment.

2. Said Circuit Court of Appeals erred in holding that the sale and transfer by Charles P. Dewey, of his stock in said bank, did not release him from all liability for said bank's debts.

3. Said Circuit Court of Appeals erred in holding that said First National Bank was insolvent in December, 1894, and January, 1895, notwithstanding that the uncontradicted evidence in the record shows that said bank continued as a going concern and in the transaction of its ordinary business until May 20, 1897. (Rec. Cross. App., 26.)

We contend that

First. The only question presented by the record is whether a sale of stock in a going bank, made by a stockholder with actual or imputed knowledge that the bank is insolvent, is voidable under all circumstances.

Second. A sale of stock in a going bank with actual or imputed knowledge of the insolvency of the bank can only be avoided if it results in injury to creditors.

Third. The record in this case does not establish that Dewey knew or ought to have known of the insolvency of the bank at the time he made his sale or that the bank was in fact insolvent.

Fourth. In any event Dewey's estate should only be held for the *pro rata* share of the debts of the bank existing at the time of his transfer and which remained unpaid at the time of the appointment of the receiver.

Fifth. The sale of the 25 shares should have been sustained by the Court of Appeals.

ARGUMENT.

THE ONLY QUESTION PRESENTED BY THE RECORD IN THIS CASE IS WHETHER A SALE OF STOCK IN A NATIONAL BANK, IN OPERATION AS A GOING CONCERN, AND MADE WITH ACTUAL OR IMPUTED KNOWLEDGE OF THE BANK'S INSOLVENCY, IS UNDER ALL CIRCUMSTANCES VOIDABLE BY THE RECEIVER.

We respectfully submit that counsel for appellant are under a misapprehension as to the question which was submitted by the record to the Circuit Court of Appeals and decided by that court. Counsel argue in this court the proposition that a sale of stock by a stockholder in a national bank *not in good faith, but made to avoid liability upon the stock*, is void as to creditors.

As we have already stated, there was no finding by the Circuit Court that the sale by Dewey was made in bad faith to avoid liability as a stockholder. This was a contested proposition, and if counsel for appellant were not satisfied with the court's ruling thereon, they should have brought the matter to the attention of the Court of Appeals in their assignments of error. The Circuit Court expressly found that there was no evidence tending to show any fraud upon the creditors. (Rec., 275.) This was equivalent to a finding that there was no bad faith or fraudulent intent. The decree against Dewey was based upon the proposition that being chargeable with notice of the bank's insolvency, he could not sell his stock and avoid liability for existing debts.

Counsel for the receiver were evidently satisfied that the concurrence of the two facts, namely: the insolvency of the bank and the seller's knowledge thereof, was sufficient to charge Dewey with liability, regardless of whether his sale was made in good or in bad faith.

The assignments of error in the Court of Appeals were on this theory. The errors appear on page 280 of the record. The first one relates to the action of the Circuit Court in holding Dewey only for debts in existence at the date of the sale of his stock.

The second error assigned raises no specific question. The third error assigned is the one upon which the Court of Appeals acted. It reads as follows:

"That after the court had found that the bank was insolvent in December, 1894, and January, 1895, the date Dewey sold his one hundred and five shares in question in this proceeding, and that Dewey knew or ought to have known that fact, he should have entered a judgment or decree in favor of complainant and against the said Charles P. Dewey for the full amount of the assessment upon the stock of the bank on the one hundred and five shares of said stock owned by the said Charles P. Dewey."

The fourth and fifth errors assigned were sustained by the Court of Appeals. The court directed that a decree be entered against Dewey upon the 25 shares mentioned in the two assignments of error. The remainder of the assignments of error relate to the action of the Circuit Court upon certain specific claims passed upon by the court. They do not in any way relate to the question now under consideration.

The foregoing assignments of error simply present the question whether the concurrence of the two

facts,—that the bank was insolvent and that Dewey knew or ought to have known that fact,—was sufficient to charge him with liability on his stock.

Unless the existence of these two facts of itself results in a necesary implication of bad faith and intent to escape stock liability, then the question of the effect of bad faith and actual intent to escape stock liability was not raised by the assignments of error or presented to the Court of Appeals for decision.

An examination of the opinion of the Court of Appeals shows that they decided that the mere fact of insolvency and actual or imputed knowledge thereof was not sufficient to charge Dewey with liability. The court said, in rendering its opinion:

"What are the conditions without the existence of which such a former stockholder cannot be held?

He cannot be held unless the bank was insolvent at the time of the transfer, for the creditors would not be injured. * * *

He cannot be held unless he knew or ought to have known that the bank was insolvent at the time of the transfer, for an out and out sale, found to have been made in *good faith*, cannot be impeached. But this negative does not affirm that he is liable if merely the two conditions concur, insolvency and his actual or imputed knowledge thereof. *In this case, however, it is asserted that the concurrence of the two conditions establishes liability;* * * * *We apprehend no true reason for holding that the mere concurrence of the bank's insolvency and the stockholder's actual or imputed knowledge thereof inevitably and without any other condition establishes the bad faith, the fraudulent intent, of the selling stockholder.* * * * The supposed liability would charge the selling stockholder with the fraudulent intent to cheat the bank's creditors, even though he had diligently sought and had succeeded in finding a purchaser, who was willing to

take the chances of the bank's ultimate failure and suspension and who was amply able to respond to an assessment. We conceive that a sale of the character instanced could be made in perfect good faith, that the transfer of the shares could be effected on the books of the bank in accordance with the statute and the by-laws of the bank and that again in accordance with the statute, the purchaser would succeed to all the rights and all the liabilities of the former holder of such shares." (Rec., 296-297.)

It is obvious that if the Court of Appeals had been of the opinion that the record disclosed evidence of bad faith and intent to defraud creditors other than that involved in a sale with knowledge of insolvency, the foregoing discussion was unnecesary.

It will be seen that the Court of Appeals therefore expressly overruled the contention that a sale with actual or imputed knowledge of insolvency of itself establishes bad faith and fraudulent intent and is sufficient to charge the selling stockholder.

This was the question presented by the assignments of error and the question was decided adversely to the appellant. The court then proceeded to discuss what would be necessary in addition to insolvency and imputed knowledge thereof to charge the stockholder. But this discussion was upon the express assumption that a sale with imputed knowledge of insolvency was conclusive evidence of bad faith. The court said:

"But even if it were conceded that such a sale, in and of itself, conclusively evidenced the bad faith and fraudulent intent of the seller, a right of action in the receiver as the representative of the creditors would not be established. Surely, if the purchaser responded to the assessment levied on the transferred shares, the receiver should not be permitted to maintain a suit against the seller. Surely, if the purchaser was able

and compellable to respond, the receiver should not be permitted to sue the seller or the purchaser at his election, but should be required to collect from the purchaser who had succeeded to all the rights and liabilities of the seller. It is not enough that a sale be fraudulent as to creditors,—the creditors must be injured by the fraud; and they are not injured if they have a direct and primary means of collecting their debts, without resort to the secondary means of setting aside the fraudulent sale. The argument results in the conclusion that *the mere concurrence of the bank's insolvency and the selling stockholder's actual or imputed knowledge thereof does not make out a case.*" (Rec., 297.)

The decision of the Circuit Court that the concurrence of the two facts mentioned did make a case was therefore squarely overruled on the contention raised by appellant's third assignment of error.

Counsel for appellants now contend in this court that the Court of Appeals held that a sale by a stockholder of stock in a failing bank, with knowledge of its insolvency, and with a specific intent to avoid liability and to defraud creditors, will not release him from liability to creditors. The Court of Appeals did not so hold. It held that a sale with actual or imputed knowledge of insolvency does not conclusively establish bad faith, but even if it does, that additional grounds of liability would have to be asserted. The question, however, what effect actual bad faith, and an actual intent to escape liability, would have upon such a sale, was not presented to the Court of Appeals by the assignments of error.

The assignments of error in this court raise substantially the same question as that raised in the Court of

Appeals—that insolvency and knowledge thereof are sufficient to charge the selling stockholder.

The first assignment of error is that the court erred in holding that the insolvency of the bank and Dewey's knowledge thereof were not sufficient to create liability. The third assignment is to the same effect. The fourth assignment expressly states that the court erred in holding and deciding that "the mere concurrence of the bank's insolvency and the selling stockholder's actual or imputed knowledge thereof does not render him liable." (Rec., 311, Brief 5.) The fifth and sixth assignments of error are not in point.

The second assignment of error does not raise the question of the effect of bad faith or of an actual intent to escape liability upon a sale by a stockholder. The Court of Appeals may have erred in the holdings complained of in this assignment. The concurrence of other facts than the three specified may have been sufficient to charge Dewey. But if such facts were not called to the court's attention in some proper manner, then the court was justified in directing a decree for Dewey, if the facts brought to the court's attention by the assignments of error, namely, insolvency and knowledge thereof, were not sufficient to charge him.

We submit that counsel should be confined in this court to the errors raised in and passed upon by the Court of Appeals; that they should not seek a reversal of the judgment of that court upon points which were not properly brought to the attention of the court or passed upon therein.

Counsel staked their case in the Court of Appeals upon the proposition that a sale of stock with actual or

imputed knowledge of the bank's insolvency is not sufficient to relieve a stockholder from liability for the bank's debts.

If that proposition is unsound then the action of the Court of Appeals, in rendering judgment against the appellant, should be affirmed.

The proposition stated entirely ignores the question of good faith and the intent to avoid liability, unless bad faith and an intent to avoid liability will be inferred under all circumstances from such a sale.

We submit that the holding of the Court of Appeals, that there is "no true reason for holding that the mere concurrence of the bank's insolvency and the stockholder's actual or imputed knowledge thereof inevitably and without any other condition establishes the bad faith the fraudulent intent of the selling stockholder" (Rec., 296), is sound. Otherwise there can be no such thing as a transfer of bank stock in good faith after the bank's assets become less than its liabilities and such fact becomes known to its stockholders. Indeed the proposition goes further; it asserts that there can be no transfer of bank stock in good faith if the stockholders have *imputed* knowledge that the bank's assets are less than its liabilities. The rule contended for would result in many cases in saddling stockholders for years with an uncertain liability which they could in no possible way escape. It would materially affect the value of bank stock as an investment.

Good faith and the absence of fraudulent intent would count for nothing.

The selling stockholder might sell with actual intent to benefit creditors of the bank and a sale might so

result. In many cases the stronger stockholders of a failing bank take over the holdings of the weaker stockholders in an attempt to give added credit to the bank and to prevent its failure. In such a case although the purchasing stockholder might be much better able to respond to an assessment than the selling stockholders, and the entire transaction might be actuated by motives of good faith, nevertheless the law would charge the selling stockholders with an intent to defraud creditors

Counsel for appellant have not discussed the proposition that a sale with knowledge of insolvency necessarily establishes bad faith and a fraudulent intent of the selling stockholder. They argue, on page 20 of their brief, that as a matter of policy all sales of stock in insolvent banks, made knowingly, should be voidable, but they cite no authority in support of the proposition. Their main contention is that a sale with actual or imputed knowledge of insolvency, and *made with a fraudulent intent to escape double liability* is voidable. They argue that in the Hayden case this court "rested the whole matter on the question of the intent with which the transfer was made." (Brief, 11.) They discuss at length the effect of an intent to avoid liability.

They apparently agree with the Circuit Court of Appeals that another condition besides insolvency and knowledge thereof is necessary in order to charge a selling stockholder. This condition, according to their contention, is bad faith and fraudulent intent to escape liability.

But they have failed to cite to the court any finding of the Circuit Court to the effect that Dewey sold his

stock fraudulently or with an intent to evade liability. A transfer with such intent is a fraud on creditors, *Stuart* v. *Hayden,* 169 U. S., 1-8, and the Circuit Court found in the case at bar that no evidence had been introduced *tending* to show any fraud upon creditors. (Rec., 275.) This finding stands unattacked.

No reference to the evidence is made by counsel. They assume that the Court of Appeals found that the transfer by Dewey was not made in good faith, as an ordinary business transaction, but for the purpose and with the intent of avoiding liability. We submit that no such finding was made by the Court of Appeals.

In this connection the language of the court in *Earle* v. *Carson,* 188 U. S., 42-48, is pertinent. The court said that from various reasons "we think it results that the power to transfer stock like other personal property is not limited by the mere fact that at the time of the transfer the bank which was a going concern was insolvent in the sense that its assets if liquidated would not discharge its liabilities unless it be shown that the seller was aware of the fact and *had sold his stock to avoid the double liability which was impending.*"

We respectfully submit therefore that unless this court is prepared to hold that the mere concurrence of the bank's insolvency and the stockholders' actual or imputed knowledge thereof, without any other condition, establishes bad faith and fraudulent intent, then on the record made in this case the judgment of the Circuit Court of Appeals should be affirmed.

II.

A SALE OF STOCK IN A GOING BANK, WITH ACTUAL OR IMPUTED KNOWLEDGE OF THE INSOLVENCY OF THE BANK, CAN ONLY BE AVOIDED IF IT RESULTS IN INJURY TO CREDITORS.

We will discuss this proposition upon the assumption made by the Court of Appeals, that a sale in a failing bank, with knowledge of insolvency, is conclusive evidence of bad faith and fraudulent intent of the seller, although we contend that no question of Dewey's good or bad faith is presented by the record made in this case.

Was the Court of Appeals right in holding that such a transfer is not voidable unless it results in injury to the receiver or creditors?

A sale to a solvent purchaser, who is able to respond to an assessment, cannot in the nature of things result in actual injury to the receiver or creditors. Complainant's bill proceeded on the theory that it was necessary to allege and prove some injury as a ground for relief. It alleged insolvency of the transferees as constituting damage to the receiver.

In paragraph 4 of complainant's bill, it is alleged in reference to the transfers by Dewey to Jewett, that Jewett "was at the date last aforesaid pecuniarily an irresponsible person and a person from whom the amount of such assessment upon the shares of said capital stock, so held and owned by said respondent, could not be made by legal process or otherwise; so that your orator, by reason of the pretended sales of

said stock by and from the said respondent to said F. L. Jewett and the insolvency of said F. L. Jewett and his pecuniary inability to respond to damages as herein set forth, and stated, your orator is deprived of his remedy at law for the collection of his assessment of $43,000 made upon the capital stock of said First National Bank as is applicable to the 105 shares thereof owned or otherwise held by the said Charles P. Dewey." (Rec., 236.)

In section 6 of the bill it is charged that transfers from Jewett were fraudulent "and were made to persons who were financially irresponsible and unable to respond to the said assessments." (Rec., 237.)

The bill charges not only a fraudulent transfer but a consequent injury to the receiver representing creditors. It is now claimed in substance that the allegation of injury was immaterial and that Dewey should be held liable upon proof that he knew or ought to have known of the bank's insolvency; that such facts alone establish bad faith and a fraudulent intent on the part of Dewey.

This contention, if sustained, places a serious restriction upon the right of a bank's stockholders to transfer their shares.

The right to transfer national banking shares is conferred by Section 5139 of the national banking act, which reads as follows:

"Section 5139. The capital stock of each association shall be divided into shares of $100 each and be deemed personal property and transferrable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall in pro-

portion to his shares succeed to the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired."

The right conferred by the statute is not merely to transfer the stock, but to have the purchaser succeed to all liabilities of the prior holder.

There are no restrictions in the statute upon this right of transfer. So far as the language of the statute goes every shareholder has full right to transfer his stock under all circumstances to a transferee who shall succeed to his rights and liabilities.

In the recent case of *Earle* v. *Carson,* 188 U. S., 42, this court had occasion to discuss the importance of the right of transfer conferred by this section. Quoting from the case of *Bank* v. *Lanier,* 11 Wallace, 377, the court said:

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." (46.)

And this court ruled against a restriction which was sought to be imposed upon the right of transfer.

From these decisions it appears that the right of transfer by a stockholder is favored by the courts. On the other hand, the receiver in this case is seeking to enforce the double liability imposed by statute upon

shareholders, and in order to more successfully enforce it he seeks to have restrictions placed upon the right of shareholders to transfer their stock to persons who shall succeed to their liability for debts of the bank.

This court, in the case of *Brunswick Terminal Co.* v. *National Bank of Baltimore,* 192 U. S., 386, in construing a statute of Georgia imposing this double liability held that the statute was in derogation of the common law and should be strictly construed. While statutes of the United States, strictly speaking, may not be in derogation of the common law, as there is no common law of the United States, nevertheless the same principle of construction should be applied in construing a statute which imposes a liability in the nature of a penalty. The rights conferred should not be extended further than absolutely necesary to accomplish the purpose intended. The purpose of the statute imposing a double liability on bank stockholders is unquestionably the protection of creditors of the bank. The liability imposed is for the benefit of creditors only. It is not an asset of the bank. It cannot be collected by the bank or in its interest.

Richmond v. *Irons,* 121 U. S., 27-50.

The rights of both shareholders and creditors are based upon the statute. It may be conceded that the rights of the parties are contractual in their nature, as counsel contends, but nevertheless the terms of the contract are contained in the statute. The statute in express terms provides that the shareholder may transfer his stock and that the purchaser shall succeed to his rights and liabilities thereon.

It is now contended by the receiver that a restriction should be placed upon this right of transfer; that the shareholder should be restricted from selling his stock even to a solvent transferee after he knows that the assets of the bank are insufficient to pay its liabilities, and although the bank may continue as a going concern.

The restriction contended for places a burden upon the diligent stockholder which his less vigilant and careful associate escapes. The stockholder who takes an interest in the affairs of the bank, and endeavors to keep himself posted, runs the risk of making discoveries which will deprive him of his full statutory right to dispose of his stock. The less vigilant and careful shareholder escapes this penalty.

As the Court of Appeals suggested in its opinion, the restriction contended for puts a premium upon stockholders remaining in ignorance of the affairs of the bank. (Rec., 297.)

If this restriction is necessary to protect creditors from injury, there is basis for it. But counsel claim that it should be imposed regardless of such necessity. They claim the right to hold the selling stockholder even if the purchaser stands ready and willing to pay his assessment. They claim the right to enforce the assessment against both the purchaser and seller. In the case at bar, the receiver took a decree against the purchasers of Dewey's stock for the full amount of the assessment on 105 shares. (Rec., 274.) Where both purchaser and seller are able to respond, enforcement of the restriction results in collecting a double assessment, so that creditors not only are not injured by a

sale, but are better off because of it. In such a case other stockholders escape payment of their *pro rata* share of debts.

We submit that such a result is not within the intention of the statute. The purpose of the statute is met if creditors are protected from injury. Such protection is afforded if the restriction on the right of the selling stockholder is limited to sales to insolvent transferees.

When, therefore, a receiver seeks to restrict the statutory right of a shareholder to dispose of his stock, he should be required to prove that the sale complained of has injured creditors.

In all of the cases which we have been able to find in this court the restriction placed upon the right of a shareholder, in an insolvent bank, to sell his stock and escape liability has been limited to sales to irresponsible transferees.

In the case of *Bowden* v. *Johnson*, 107 U. S., 251, the court was called on to decide whether an out and out transfer of stock by a stockholder of a failing bank was sufficient to relieve him from liability. In its opinion, delivered by Mr. Justice Blatchford, the court found that the transferee was wholly irresponsible and unable to respond for any liability as a stockholder, and that this fact was known to the seller of the stock. The court said:

"Where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the in-

dividual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. * * * It was held by this court in *National Bank* v. *Case*, 99 U. S., 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors." (261.)

In the same case the question was raised as to the effect of an answer under oath which had been put in by the respondent. The court said (page 262):

"Under the view we have taken of the case, the only material questions which are controverted are the knowledge and intent of Johnson, and the insolvency of Mrs. Valentine, and the knowledge of the latter fact by Johnson at the time."

In that case it was recognized by the court that the insolvency of the transferee was a vital and material fact, and the evidence bearing upon that fact was discussed at length. The doctrine laid down has been followed and recognized as the law in numerous cases since.

In the case of *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S., 479, Chief Justice Waite, in delivering the opinion of the court, recognized the doctrine laid down in *Bowden* v. *Johnson* and said:

"If a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his

transfer is colorable only, the transaction is void as to creditors."

In the case of *National Bank* v. *Case*, 99 U. S., 628-632, and in several other cases since, this court has quoted with approval the American doctrine, laid down by Mr. Thompson, concerning the transfer of stock in a failing corporation, as follows:

"Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.'"

See also:

Robinson v. *Southern National Bank*, 180 U. S., 295.

In the case of *Sykes* v. *Holloway*, 81 Fed. Rep., 434, Judge Barr, in commenting upon the doctrine laid down in *Bank* v. *Case*, said:

"This statement of the Supreme Court, as quoted, is as strong a statement as I have seen; but it will be observed that it is a material element that the transfer was made in a failing corporation for the purpose of escaping his liability as a shareholder, and that the purpose is coupled with the want of capacity of the transferee to respond to his liability." (Pages 436-437.)

A colorable transfer, or an out and out transfer to an irresponsible person, to escape liability, is not good against creditors of the bank.

Morse on Banks and Banking, Sec., 683.

The reason underlying the doctrine laid down in *Bowden* v. *Johnson* is that a stockholder cannot escape statutory liability by fraud accompanied by injury. He cannot, without consent of creditors, substitute for himself a person who is financially irresponsible. It is not enough to say that a stockholder is guilty of fraud when he transfers his stock in a failing national bank. In making the transfer he is in the exercise of a right conferred upon him by statute. If his transferee is amply solvent and able to respond to an assessment, his action, even if constructively fraudulent, is accompained by no injury and furnishes no subject of judicial cognizance.

In the case of *Clarke* v. *White*, 12 Peters, 178, at page 196, this court held:

"In equity, as at law, fraud and injury must concur to furnish ground for judicial action; a mere fraudulent intent, unaccompained by any injurious act, is not the subject of judicial cognizance. Truly, there are strong grounds of suspicion, but fraud ought not to be conceived; it must be proved, and expressly found."

See also:

Ming v. *Woolfolk*, 116 U. S., 599.

But it is contended that this court in the case of *Stuart* v. *Hayden*, 169 U. S., 1, has decided that proof of the insolvency of the transferree is unnecessary.

An analysis of the facts upon which the Stuart case was decided discloses that the court was not called upon to decide the question presented in this case. The case was heard on an appeal from the Circuit Court of Appeals for the 8th Circuit. The opinion of that court is found in the case of *Stuart* v. *Hay-*

den, 36 U. S., App., 462. The Court of Appeals in rendering its decision said:

"The court below was required to answer two questions and two questions only. They were: (1) Did Stuart make this transfer of his stock to Gruetter & Jores on December 23, 1892, with knowledge, or with such notice as would, if pursued with reasonable diligence, have given him knowledge that the bank was insolvent or that its failure was impending, and for the purpose of escaping from his individual liability on the stock? And (2) *did the transfer cause any damage to the creditors of the bank?* The trial court, after considering the evidence submitted, answered both these questions in the affirmative, and the only question remaining for us to consider upon this branch of the case is whether there was sufficient testimony to fairly warrant these conclusions."

The Court of Appeals after considering the evidence at length, found that the transferrees of the stock were insolvent and that the creditors were therefore damaged by the transfer. The case was decided substantially in harmony with the views contended for by the appellees in the case at bar.

Counsel claim in their arguments that the Court of Appeals found that at the time of the transfer Gruetter and Jores were solvent. The Court of Appeals did say that they were solvent before but insolvent immediately after the transfer was completed. They were therefore unable to respond to an assessment.

When the case reached this court the court accepted the views of the Court of Appeals upon the ultimate facts (Stuart case, *supra*, p. 14), one of which, of course, was that the transferree was insolvent. The case passed upon in this court was therefore whether a transfer by a stockholder to an irresponsible trans-

feree, made after the stockholder knew of the insolvency of the bank, and with intent to evade liability, was voidable. The decision of the court on these facts did not in any way conflict with its prior rulings. Under the facts presented the court was not called upon to decide whether a transfer to a solvent transferee, resulting in no injury to the creditors, would be voidable by the receiver of an insolvent bank. What the court actually decided and intended to decide is set forth in the case of *Earle* v. *Carson*, 188 U. S., 42, where the court, in discussing the opinion in *Stuart* v. *Hayden*, said:

"But in any event the observation relied upon was not essential for the decision of the case of *Stuart* v. *Hayden*, and moreover its meaning is clearly shown by the context of the opinion in which the difference between the American and English rule is pointed out. When this is borne in mind it will be seen that the expression in *Stuart* v. *Hayden* refered to but stated that difference, and, being taken in connection with other clauses of the opinion in that case, must be understood as implying that a real or out and out transfer would not be adequate to relieve the seller from his liability as a stockholder if the sale was made by him to escape his impending liability and *to a person whom he knew, or had reason to know, was financially irresponsible.*" (55.)

We submit that for the reasons given the Stuart case is not decisive of the case at bar.

Counsel for appellant have been unable to cite a case in which it has been held that a sale to a solvent transferree is voidable. In the case of *Marcy* v. *Clark*, 17 Mass., 330, the fact of the insolvency of the transferree was not mentioned in the court's opinion. It appears, however, that it was claimed before the jury

that he "was a man destitute of property," and that the jury's finding was in favor of the claimant.

The contention of appellant that a sale to a solvent purchaser should not relieve the seller seems to be based largely upon equitable considerations.

We contend that the question is not one of equitable rights but of statutory construction. What are the respective rights of the parties under the National Banking Act? Dewey claimed the right under the statute to transfer his shares without restriction and thereby to escape further liability. But an absolute right of this character might result in defeating the claims of creditors under another section of the statute and as the court said in *Earle* v. *Carson, supra,* it will not construe one section of the statute so as to destroy the essential features of another section.

But the converse of the proposition is equally true. Creditors seeking to enforce a liability under the statute will not be heard to insist upon restrictions upon rights conferred by other sections of the statute unless such restrictions are necessary to protect them from injury.

Creditors under such circumstances must necessarily assume the burden of showing that injury will ensue unless the restriction is imposed.

The decision of the Circuit Court of Appeals in this case goes no further than to impose such burden on the appellant.

The judgment of the court is supported by reason and authority and as to the eighty shares involved should be affirmed.

It remains to be considered whether the finding of the Court of Appeals, that the transferees of Dewey were not shown to be insolvent, is sustained by the record. The finding of the Court of Appeals on that proposition was unanimous. Judge Baker, speaking for the court, said:

"Without stating the items, it is enough to say that we all agree that there is *an utter failure of proof* of the insolvency of the various transferees, and on the contrary there is considerable proof that they were solvent and able to respond to an assessment." (Rec., 298.)

This finding of the Court of Appeals should be accepted unless it clearly appears that the court erred as to the effect of the evidence.

Stuart v. *Hayden, supra,* 14.

The record shows that 30 shares of the stock represented by certificates 96, 97, 100 and 101 were transferred by Jewett, as Dewey's agent, to Charles H. Killough. (Rec., 3.) These shares were transferred by Killough to J. G. Hatcher and by J. G. Hatcher to C. C. Hatcher. (Rec., 3.)

Killough testified that before making the trade he made inquiries about the stock. He testified "I would not have taken the stock if I had not thought it reasonably good." (Rec., 232.) He testified that he resided at 5506 Greenwood and was managing the business of W. B. Allis & Co., manufacturers of physicians' furniture.

In the transaction involving the sale of the stock Killough received $3,750 in cash, 30 shares of stock, and Dewey assumed an incumbrance of $1,500 on the property taken in exchange. (Rec., 231.)

No evidence as to Killough's financial standing was introduced by the receiver. He was called by the respondent and testified that at the time he purchased the stock he would have been able to pay an assessment upon it.

Counsel for appellant claim that in his cross-examination he testified that he was not able to pay an assessment upon it. The record is a mere abstract of the evidence and it is difficult to determine in what connection Killough made the statement which is contained on page 232 of the record. Counsel claim that as he could not pay the mortgage of $1,500 on his property it is pretty clear that he was insolvent. There is no evidence in the record that Killough could not pay the mortgage of $1,500 on his property. There were two pieces of property in the trade and he testified that one piece was clear. The Ashland subdivision property was clear. (Rec., 232.) This fact bears upon the question of Killough's ability to pay the mortgage on his other land.

There is nothing in this evidence to show that Killough was not amply responsible. The transaction was made in perfect good faith as between the parties. The purchaser understood that the bank was not paying dividends and he carefully examined the bank statement furnished, and after being fully advised he made the trade. (Rec., 232.)

He held the stock for a time "and then transferred it to Mr. Hatcher of Oak Park, who was regarded as a man of wealth." (Rec., 231.) No other evidence bearing upon the solvency of the Hatchers was offered.

Twenty shares, evidenced by certificate 103, were

sold to Charles Jouvenat. (Rec., 3-227.) The title to these shares was taken in the name of Jules W. Jouvenat, his son. (Rec., 227-228.) Charles Jouvenat testified that at the time of the transfer he had considerable property and was able to pay the amount of his stock from other resources than the property sold. (Rec., 230.) Jouvenat testified that before he made the trade he was informed as to conditions in Nebraska and knew that they were having dull times; that the bank had not paid a dividend for the year 1894. (Rec., 227.) He was out in Nebraska in October or November, 1894. (Rec., 228.)

As counsel states, a portion or part of the property held by Jouvenat was under foreclosure at the time of the sale. Jouvenat testified, however, that it was under Master's certificate when he bought it. (Rec., 229.) He further testified as follows: "In the first transaction I told Mr. Davis (his co-owner) we ought to have more of the stock because we were not getting the price we asked for our property. There was a mortgage on the property. It was a fine property and we wanted more money. Mr. Davis reported they refused to give any more." (Rec., 228.)

This statement is hopelessly inconsistent with appellant's contention that Dewey was trying to dispose of his stock to anybody who would take it for the mere purpose of avoiding his liability.

Jules W. Jouvenat sold 10 shares of the stock to Eli K. Gauger and 10 shares to William Mathewson, and Mathewson sold 6 shares to Andrew K. Park. (Rec., 3.)

Ten shares were evidenced by certificates 109 and 110, and were transferred by Jewett for Dewey to Emile Jouvenat. This sale was negotiated by Charles

Jouvenat. There is some question on the record whether this stock was purchased by Charles Jouvenat for himself or for his brother Emile. (Rec., 229.) There is no evidence in the record as to the financial standing of Emile Jouvenat, Jules W. Jouvenat, Eli K. Gauger, William Mathewson or Andrew K. Park, at the time of the transaction in controversy in 1894. The statements quoted by counsel in this connection refer to the time of the taking of the evidence in 1902.

Twenty shares, evidenced by certificate No. 104, were sold by Dewey to L. Eberhart, who in turn transferred the same to A. C. Kendig. (Rec., 3.) There is no evidence in the record as to the solvency of A. C. Kendig.

The evidence as to Eberhart was that he owned considerable real estate near Chicago. His son, F. S. Eberhart, testified that his father owned about 380 lots in Chicago Lawn, worth about $200 a lot (Rec., 154), only 40 or 50 of which were incumbered (Rec., 151); that he had a one-third interest in certain subdivisions worth about $60,000 and incumbered for $30,000. (Rec., 150-162.)

The stock mentioned comprises the 80 shares which were transferred on the books; the remaining 25 shares were sold to L. Eberhart, A. C. Kendig and R. Dubs. There is no evidence in the record as to the solvency of Dubs.

Counsel cite the case of *People's Bank* v. *Rickard*, 139 Cal., 285, in support of their contention that the burden was on Dewey to show the solvency of purchasers from his transferrees. In the case cited, there was no sale made by the insolvent transferree; it was merely argued that there might have been and the court

properly held that that fact was a matter for affirmative proof. But when the complaining party affirmatively establishes such sales and alleges the insolvency of the purchasers as a ground of injury, he must prove his case.

From the evidence we submit that the Court of Appeals was fully justified in its finding that the transferees were not shown to be insolvent.

But counsel state that whether or not the record shows affirmatively that the transferees were insolvent, it shows that their liability was not as valuable as that of Dewey.

We contend that it is immaterial whether the liability of the transferees was more or less valuable than that of the seller, provided the transferees were solvent and able to meet an assessment.

If Dewey had been worth a million dollars and had sold his stock to a man who was worth only five hundred thousand dollars, it might be claimed that the liability of the transferee was not as valuable as that of Dewey. The Court of Appeals was called upon to decide whether the record showed affirmatively that the transferees were not able to meet an assessment. The court was not called upon to decide a question of relative ability. The record in the case does not warrant a reversal of the finding of the Court of Appeals upon this question.

III.

THE RECORD FAILS TO ESTABLISH THAT DEWEY KNEW OR OUGHT TO HAVE KNOWN OF THE ALLEGED INSOLVENCY OF THE BANK OR THAT THE BANK WAS SOLVENT AT THE TIME OF HIS TRANSFERS OF STOCK.

In our argument up to this point we have assumed that the findings of the Circuit Court, that the bank was insolvent in 1894, and that Dewey knew or ought to have known thereof, are sustained by the record. We do not concede this fact. To the contrary it was claimed in the Court of Appeals, and we still claim that the record fails to support these findings.

If Dewey did not know of the alleged insolvency of the bank, then his sale of the 80 shares out and out, in good faith, clearly relieved him from any further liability thereon.

Earle v. *Carson, supra.*

In that event the judgment of the Court of Appeals, relieving Dewey from liability on the 80 shares, was clearly right although the court may have based its judgment upon other grounds.

We are entitled to be heard in this court in support of the judgment of the lower court without assignments of cross error.

The Stephen Morgan, 94 U. S., 599.

In support of the judgment of the lower court we are entitled to show that the judgment was right upon any ground disclosed by the record.

Ridings v. *Johnson,* 128 U. S., 212-218.

3 Ency. of Pleadings & Practice, 372.

Was the bank insolvent in 1894? The fact that it continued in operation as a going concern for two years and five months after that date with the consent of the comptroller of the currency raises a strong presumption of solvency. The evidence shows that frequent examinations of the bank were made by the comptroller. His reports and letters are shown at length in the record. (Rec., 69 to 86.) It was his duty to appoint a receiver in the event of insolvency and the presumption is that he did his duty in the premises.

The bank continued its business after 1894 in the usual course and paid more than two-thirds of all of the creditors to whom it was indebted in 1894. Its deposits in December, 1894, were $39,522.19. (Rec., 219.) Of these deposits only $11,930.21 remained unpaid when the bank went into the receiver's hands. (Rec., 276-258.) The Circuit Court found that of the latter amount $7,371.88, constituting the deposit of Harlan County and A. B. Dewey were also paid. (Rec., 276.)

This presumption of solvency appellant attempted to overcome by calling witnesses to testify that owing to bad crop conditions in Nebraska in 1894 and 1895 values in that state had disappeared and that the bank's debtors were all insolvent.

There is no contention that the book assets were in any way impaired. The bank had book assets sufficient in amount to meet all its liabilities. The contention is that the assets were poor; that continued bad times in Nebraska had resulted in universal bankruptcy.

Whether or not the bank was insolvent depended on whether its various debtors were able to meet their obligations and whether the securities held by the bank

were valuable or worthless. Whether Dewey knew of the bank's insolvency depended upon his knowledge of these conditions. In other words the bank's insolvency was a matter which could be determined only by patient investigation.

Dewey purchased his stock from a firm known as Burton and Harvey in 1891. (Rec., 180.) Burton was the bank's president and continued to be until it closed its doors. At the time of the purchase Burton and Harvey were conducting a large real estate business in Nebraska and enjoyed an excellent reputation. The bank's assets were investigated by Dewey at the time of his purchase and found to be in good condition. (Rec., 186.) Burton and Harvey also guaranteed them. These gentlemen were indebted to the bank at the time and the proceeds of the sale of their stock to Dewey were used in part to pay off these debts. (Rec., 17.)

Subsequently Burton and Harvey borrowed additional sums from the bank and also from Dewey individually.

The evidence shows that in December, 1894, Burton and Harvey were indebted to the bank in the sum of $6,000 and that there was other indebtedness, which is claimed to have been practically the indebtedness of Burton and Harvey, making the total indebtedness about $30,000. (Rec., 53 to 56, 57.)

The evidence also shows that Burton and Harvey were indebted to C. P. Dewey in the sum of about $9,000; they were also indebted to Albert B. Dewey, the brother of Charles P. Dewey, in a similar sum. (Rec., 46.)

To secure the payment of the indebtedness to the bank and to the Deweys, Burton & Harvey had transferred to C. P. Dewey a large amount of lands in Nebraska, together with mortgages and tax certificates, the estimated value of which, at the time, was about $100,000. The evidence tends to show that subsequently, owing to the conditions which prevailed in Nebraska during the years 1894, 1895 and 1896, these securities depreciated in value. But that these securities were valueless in 1894, or that the parties considered them valueless at that time, is not shown by the record.

At the time of the hearing George W. Burton, president of the bank, was dead, but Miss M. F. Burton, who had acted as assistant cashier of the bank, and who was called by the receiver, testified as follows:

"As to the transfers of property made by Burton and Harvey to C. P. Dewey, the property consisted of real estate; of land and town property. George's farm near town, 1600 or 1700 acres, property in town and land near Atwood, Kansas, and a piece of land in Harlan County that sold for $2,000. Also tax certificates and first mortgages that he had advanced. The par value of about $100,000 in addition to the real estate. 421 acres of Mr. Harvey's land near Arapahoe, and 320 acres in Phillips County, Kansas. At the time this property was transferred, it was considered more than ample security to the bank and to the Deweys. In December, 1894, I do not know how the Deweys considered it. It was considered so by the rest of us." (Rec., 141.) She further testified that the parties named considered themselves worth a large amount over and above their indebtedness from 1890 to 1895.

C. P. Dewey testified that he took security from Burton and Harvey for his advances to them, which he

considered entirely sufficient to protect himself as well as the bank. (Rec., 213.)

The contracts under which these securities were deposited with Dewey are not contained in the abstract of record, which was used in the Circuit Court of Appeals and which is now on file in this court. But there is no doubt that the securities were held as well for the benefit of the bank as for the Deweys individually. This appears from Dewey's own testimony (Rec., 213-218), and from the letters which were offered in evidence by the appellant. (Rec., 25, 29.)

The witnesses testified that after the bad crop condition in Nebraska in 1893, 1894 and 1895 land values practicaly disappeared. (Rec., 116.) The evidence on this proposition however is of the most general description. The witnesses did not attempt to place values upon the lands and securities held by Dewey. The inference from all the evidence is almost irresistible that if good crop conditions had followed the year 1894 in Nebraska the securities would have been realized upon and the bank of Orleans would not have gone into the hands of a receiver. (Rec., 170.)

It is in the record as we have shown that the parties concerned were of the belief that on account of the large amount of property which Burton and Harvey had put up as security their indebtedness to the bank was amply secured. The values put upon Burton's home farm, which was up as security (Rec., 213), was about $39,500, less a mortgage of $12,000. This property alone was practically sufficient to secure the indebtedness of Burton and Harvey to the bank.

In addition to the $30,000 of indebtedness due from

Burton and Harvey or their allied interests there was about $38,000 of other bills receivable held by the bank. (Rec., 219.)

There is no doubt that a large part of these bills receivable were subsequently not collected, but on the question of the value thereof in December, 1894, the testimony of the cashier of the bank, brought out by the receiver himself, is most important and conclusive upon the appellant. He testified, in response to questions by counsel for appellant:

"December 1st, 1894, there ought to have been with proper management somewhere over $20,000 to $25,000 collected; they could too. The balance of course were doubtful. Some of them were worthless. December 1, 1894, just at that particular time, and not what might have been done later,—it is not my opinion that if just at that particular time there had been an attempt made to realize and force the collection of the bank's paper and close up the affairs of the bank, it is my opinion that it would have paid out, if it had been taken in hand by some one who had some interest in it, and looked after it carefully, with the amount of money on hand and the amount of notes that seem to have been paid afterwards, I believe the depositors could have almost been paid. Certainly the bank could not have paid while diverting the funds of the bank into other channels. Of course I was speaking of taking of what ought to have been received and applying it on the bank's indebtedness, and I believe the depositors could almost have been paid. There was something like $5,000 on hand at that time, available and in bonds in circulation and five per cent. of the redemption fund and a little premium on bonds that ought to have been realized and what we ought to have gotten out of the other assets it seems to me might have been managed so that the depositors might have been paid." (Rec., 66-67.)

Randall also testified in the same connection that

some of the larger notes, which had been on the books for many years, were subsequently paid up. (Rec., 67.)

Both Randall and Miss Burton, the assistant cashier, testified that George W. Burton, the president of the bank, was very lenient with debtors and that many of the notes could have been collected if a little pressure had been brought to bear. (Rec., 140.)

In addition to the assets mentioned the bank had its banking building and real estate in Orleans which cost the bank over $13,000. (Rec., 89, 63.)

This property was subsequently sold by the receiver for $2,500. (Rec., 102.) The purchasers testified that they stood ready to pay at least $8,000 for the property; that they bid no more than $2,500 because the receiver stated that it would be sold at that price. (Rec., 167, 168.)

This evidence goes to prove that the First National Bank was in fact solvent in 1894 in the sense that its assets were sufficient to pay off its depositors.

The appellant called P. O. Hedlund, former receiver of the bank, who testified to the worthlessness of the assets.

This testimony was given eight years after 1894. In the meantime events, which were sufficient to overwhelm any community, had intervened. But the witness attempted to give the list of debtors and to state in each particular case whether the man was solvent or insolvent in 1894. He testified as follows:

"The financial conditions were bad in 1893, 1894 and 1895 in and around Orleans, Nebraska, caused by failure of crops, quite a panic over the country. The loss

of crops was total, and the people were in distress and values absolutely disappeared and many were in want and relief was given freely. Times were a great deal better in 1897 than in 1894. * * * I knew most of the persons who gave these notes and bills receivable to the bank personally, and of their financial standing." (Rec., 116.)

Yet in his testimony, concerning the specific items, he does not undertake to state which ones of the debtors he knew personally and which ones he did not know.

He testified that he sold a large part of the bills receivable in December, 1898, for a small amount. (Rec., 102.) It does not appear that effort to collect the various amounts by suit was resorted to in any case, with the possible exception of the claim against the Lincoln Salt Lake Company. (Rec., 102.)

M. B. Holland and C. T. Simpson also testified to the insolvency in 1894 of many of the bank's debtors. (Rec., 142-143.)

Their evidence was given many years after the events concerning which they testified, and was of necessity colored by their recollection of the hard times and misfortunes which had intervened between 1894 and the time of giving their testimony.

What constitutes insolvency as a matter of law? Will a bank be held to be insolvent which for two years has continued to transact business in its usual way?

In was held in *Minton* v. *Stallman*, 96 Tenn., 98, that a bank is not insolvent as long as it is meeting its liabilities in due course of business and there is an expectation entertained on reasonable grounds of belief by those who are familiar with its business that it will continue to meet its obligations.

Insolvency is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An act of insolvency takes place when this condition is demonstrated and the person has actually failed to meet some of his obligations.

Dodge v. *Martin*, 17 Fed. Rep., 660.
Buchanan v. *Smith*, 16 Wall., 277.

It was held in *Dodge* v. *Martin* that a bank is insolvent when from the uncertainty of being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities, it makes an assignment by which the control of its affairs and property passes out of its hands.

Although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense that its assets become a trust fund for *pro rata* distribution among its creditors, so long as it continues to be a going concern, and conducts its business in the ordinary way.

Comfort v. *McTeer*, 7 Lea., 652, 660.
Publishing Co. v. *Wheel Co.*, 95 Tenn., 634.

Insolvency expresses the inability of a party to pay his debts as they become due in the ordinary course of business.

Toof v. *Martin*, 13 Wall., 47.

In the recent case of *Earle* v. *Carson*, 188 U. S., 42, this court took occasion to say that *mere inadequacy of assets of a bank to pay its debts was not insolvency, but that the true definition of insolvency is failure and consequent suspension of business.*

In view of these authorities, of the evidence cited and of the fact that the First National Bank of Orleans continued in business for two years and five months after the date when it is claimed that it was insolvent we contend that the Circuit Court was not justified in holding that the bank was insolvent in 1894. The fact that the bank continued in business for two years and five months was sufficient of itself to rebut the evidence on the question of insolvency introduced by the receiver. Evidence of witnesses given eight years after the events concerning which they were testifying and relating to facts of which they could have but a most superficial knowledge in any event was not sufficient to overcome the presumption of solvency growing out of the fact that the bank was able to continue in business for two years and a half.

The fact that the bank was able to continue in business for that length of time under the critical examinations of the comptroller establishes that its ultimate insolvency and suspension must have been caused by events other than those existing in 1894. If the entire community became bankrupt as the result of one crop failure in 1894 and all values disappeared, it is inconceivable that the comptroller would have permitted the bank to continue in business.

Farming communities do not succumb to one crop failure. But the disastrous year of 1894 in Nebraska was followed by a short crop in 1895. (Rec., 63.)

The bank was dependent upon a farming community. The looked-for relief after 1894 did not appear and the demoralization became complete.

But that the bank had sufficient good assets in December, 1894, to meet its debts, if the assets had been properly handled, is proven by appellants own witness. (Randall, Rec., 66.)

We submit that the record fails to establish a condition of the bank which can properly be termed insolvent.

But if the bank should be held to be insolvent, was Dewey chargable with notice of the fact?

It is obvious from what has been said that the only method by which the fact of the alleged insolvency of the First National Bank could be determined in 1894 was by a critical examination of the financial condition of the various debtors of the bank and of the conditions of the properties held by the bank. What evidence is there in the record that Dewey knew or ought to have known these conditions?

They were evidently not known to the bank examiners, otherwise the bank would not have been allowed to operate for a period of two years and five months after it was insolvent.

There is no evidence in the record to fasten knowledge of these conditions upon Charles P. Dewey. The evidence shows that he resided in Chicago; that after the purchase of his stock in 1891 he visited Orleans in January, 1893, in February, 1893 and in September, 1893. (Rec., 91.) He was not a director of the bank at any time or active in its management. He was elected vice-president in January, 1892, and continued as vice-president until January, 1895. The by-laws of the bank are not in evidence and it does not appear what the duties of the vice-president were. In

the absence of other evidence it is fair to presume that they were nominal and merely what the name implies—to act in place of the president.

The evidence shows that George W. Burton, the president, was active during the entire period from 1892 to 1895, and that Mr. Dewey was not called upon to exercise any active duties in connection with the bank.

Practically all of Dewey's transactions with the bank are shown by correspondence. This correspondence was in possession of the receiver and was offered in evidence. The letters which were actually written by Charles P. Dewey himself are shown as exhibits 59, 60, 61, 77, 64, 65, 71, 72, 73, 62, 78, 79, 80, 81, 83, 84, 85, 87, 88, 89, 90, 92, 93, and 96 to 106.

There is nothing in any of these letters to show that Dewey knew that the bank was insolvent or had any reason so to believe. There is nothing in the correspondence to show that he was kept informed as to the financial standing of the borrowers of the bank. During the financial crisis of the summer of 1893, Dewey asked for a daily statement of the condition of the bank, and it appears that such statements were rendered him for a time. These statements showed the condition of the bank's business at the expiration of each day's transactions. It can not be claimed that there was anything in these to post Dewey as to the solvency of the bank's debtors.

The evidence shows that at the time he purchased his stock there was an examination of the bank's assets and they were found to be good; furthermore that they were expressly guaranteed by Burton and Harvey,

from whom the stock was purchased. There is no evidence that during the visits which Dewey paid to Orleans he was informed that the assets of the bank were in bad condition or that facts were brought to his attention which would lead him to infer that fact.

A list of the notes of the bank was sent to Dewey about January 18, 1894. (Rec., 202.) This gives the dates of maturity of the various notes and of securities held therefor. Few of the notes are shown thereby to be long overdue and these only for small amounts. The assets of the bank were apparently in good shape.

The last statement received by Charles P. Dewey, concerning the condition of the bank, was a letter from the cashier under date of November 20, 1894, to C. M. Hogg. The evidence shows that this letter was shown to Dewey. (Rec., 170.) In this letter the cashier reports as follows:

"As to the notes, under the present conditions and arrangements I would have to report all good, for I think there was security turned over to C. P. Dewey sufficient to make every thing good. Of course this is held by him individually and not as trustee, but I think it will not matter, for I am sure he will handle the property placed in his name as will best protect the bank's interests. It will take some time to realize on this security, owing to the failure of crops here this year. Had this been a good year I feel that a large amount of this land would have been sold and many of the notes that on their face seem bad, would have been taken up. * * * I have no fears of any losses, but the larger proportion of our paper will have to be carried over."

The security referred to was security for the Burton & Harvey indebtedness. The balance of the assets were reported good.

This letter shows a belief, that owing to the crop failure of the year 1894, matters were in an uncertain condition, but that several years of good crops would straighten matters out.

There is no reason to believe from the evidence that Charles P. Dewey had any different opinion or any reason for a different belief. He testified positively under oath that such was his belief and that he had no reason to doubt the solvency of the bank. (Rec., 186, 187.)

There is nothing in the record which shows actual knowledge by Dewey that the assets of the bank were in such condition that the bank was insolvent. The officers of the bank evidently did not believe that they were. Why should Dewey, whose means of knowledge were limited, know more than the bank's *active* officers?

It was argued that many of the notes in the bank had been there for a long period of time and that this fact was sufficient to charge Dewey with knowledge that they were worthless. The evidence shows that the bank did business in a farming community and that it was necessary to carry borrowers for a long period of time. (Rec., 140.)

It is in evidence that the note of Dunlay Brothers for $5,145, which had been in the bank since 1891, was finally paid. This note was made the subject of express complaint in a letter of the comptroller of the currency which was brought to the attention of Dewey. (Rec., 74, 27.) Another note for the sum of $2,000 given by Pat Gibbon was also in the bank for many years and was finally paid. (Rec., 54, 67.)

The fact, therefore, that notes were held by the bank

for a long period of time did not indicate that they were bad. The fact was simply indicative of the manner in which banking business was done in that community.

The attempt to charge Dewey with notice of the condition of the bank's assets is based upon an inference that he must have known of the condition because witnesses of the receiver, eight years after the event, were willing to testify that the various debtors were insolvent in 1894.

We submit that this evidence is entirely inconclusive. No substantial evidence that Dewey actually knew of the condition of the bank's assets in 1894 was offered.

All that appellant has succeeded in proving definitely is that in the Fall of 1894 conditions were such that financial difficulties would follow unless the farming community was relieved by a series of good crops, and that such fact was generally recognized. This is very far from an actual showing of insolvency and worthlessness. That Dewey had any other knowledge or belief is not established by the record, and cannot be reasonably inferred.

But the most persuasive evidence of the bank's solvency is the fact that the comptroller permitted it to continue in active business for more than two years after 1894 and that it was able to meet its obligations from day to day during that period.

The comptroller knew the conditions in the financial world during 1893 and 1894. Bank failures were numerous. As a result it may be fairly presumed that bank examinations were rigid. The conditions in Ne-

braska were known to the comptroller. In February, 1897, he wrote to the bank:

"The comptroller fully realizes the condition of affairs existing in the locality in which your bank is situated and has been disposed to be as lenient as possible *consistent with duty.*" (Rec., 86.)

He knew the effect of these conditions upon the bank's debtors,—the effect of bad crops upon a farming community. With full knowledge of all the conditions, he permitted the bank to continue in business for more than two years after the date when appellant's witnesses swear that it was insolvent. This action amounted to an adjudication of the bank's solvency.

Eight years later the receiver seeks to stultify his chief by calling witnesses to prove that the bank was in fact insolvent in 1894 and should have been placed in a receiver's hands then. In proof of his contention, the receiver relies principally upon crop conditions in 1894—conditions which were fully known to the comptroller at the time.

We submit that the action of the comptroller at the time, followed by a successful operation of the bank for over two years, should have more weight in determining the bank's solvency than the guess work of witnesses eight years later.

The lower courts were, therefore, wrong in holding that the bank was insolvent in December, 1894, and that Dewey knew of its insolvency. On this ground, the judgment of the Court of Appeals as to the eighty shares should be affirmed.

IV.

DEWEY WAS LIABLE ONLY FOR HIS PRO RATA SHARE OF THE DEBTS OF THE BANK EXISTING AT THE TIME WHEN HE TRANSFERRED HIS STOCK AND WHICH REMAINED UNPAID AT THE TIME OF THE FAILURE.

Assuming, for the purposes of the argument, that the court shall be of the opinion that Dewey was liable to respond to an assessment upon the stock, the question arises whether his liability was for the entire assessment of $86 a share, or whether his liability was limited to his *pro rata* share of the debts existing at the time of his transfer and which remained unpaid at the time of the closing of the bank.

So far as we have been able to ascertain, this question has not been passed upon by this court.

The question presented is one of importance to stockholders. Can a liability for future debts be held over a stockholder for an indefinite period after he has sold his stock in a bank? Can creditors, who have become such after his transfer, and who on no possible theory could have trusted the bank upon the faith of his being a stockholder, subsequently compel him to respond for portions of their claims? If this is so, then stockholders who are dissatisfied with the management of a failing bank, who see its assets being dissipated and debts incurred against their protest, and without their approval, have no way of terminating their liability for such debts.

Executors, guardians and trustees would be powerless to protect their estates against future loss.

We contend that after a stockholder has sold his stock out and out, and has had it transferred upon the books of the bank, so as to give notice to the world that he is no longer connected with the bank, he should be relieved from liability for debts incurred by the bank thereafter.

The statute is susceptible of this construction. It reads as follows (Section 5151):

"The *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

The statute is in the present tense and relates only to existing shareholders. They are held to respond for the contracts, debts and engagements of such association while they remain shareholders. They are held liable to those who may be presumed to have trusted the association on the faith of their connection with it.

The statute provides a manner in which creditors shall be notified of the transfer of stock. The purpose of the statute is to furnish notice to future creditors.

In the case of *Lantry* v. *Wallace*, 182 U. S., 536, 554, this court said:

"The receiver sued in this case for the benefit of creditors, who, it must be assumed upon this record, knew nothing of the circumstances under which the defendant became a shareholder. They trusted the bank and *those who appeared on the list of shareholders required to be kept by section* 5210 of the Revised Statutes, which list, that section declares, 'shall be subject to the inspection of all the shareholders and creditors of the association.' Referring to that section, this court in *Pauly* v. *State Loan & Trust Co.*, 165 U. S.,

606, 621, 622, said: 'Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as state authorities, information as to the shareholders *upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements.*' "

In *Waite* v. *Dawley*, 94 U. S., 527, this court said that the act of Congress relating to publishing lists of bank's stockholders "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators and *to what extent they might be relied on as giving safety to dealing with the bank.*" (534.)

That the notice furnished is more than theoretical is illustrated in the case at bar. Miss Burton, the assistant cashier, testified with reference to the bank's deposits that "after they [the Deweys] sold the stock inquiries came and made them [deposits] fall off a great deal faster." (Rec., 138.)

It is said in Cook on Stock & Stockholders, § 261:

"It is a well settled rule of law that a transferrer of stock cannot be charged with corporate indebtedness incurred after the transfer has been regularly made and duly recorded in the corporate books. This rule follows as a matter of course from the fact that after registry of a transfer, not only has the transferrer ceased to have an interest in the corporation, but by the registry he has given notice to all future creditors of the corporation that they cannot look to him as security for their debts."

If a creditor of a bank uses ordinary diligence, he can always ascertain who the shareholders are before he extends credit to the bank. If he does not use such ordinary diligence, and extends credit upon an indefinite idea that there are shareholders who can be made

to respond for his claim, can he subsequently look to shareholders who had previously sold their stock out and out by a *bona fide* transfer and had the sale registered on the bank's books?

If a creditor extends credit to a bank upon the faith of the standing of the stockholders, then certainly he is guilty of negligence if he fails to avail himself of the ready means furnished by statute to ascertain who such stockholders are. He is not entitled to the protection of courts of equity.

The exact question involved here has been decided by the Supreme Court of Ohio, and upon a statute substantially similar to the section 5151 of the national banking act.

The section of the statutes of Ohio, passed upon by the Supreme Court of that State, is found in the revised statute of 1890, section 3258, and reads as follows:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed or otherwise acquired to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation."

There is no substantial difference between this statute and section 5151 of the revised statutes quoted above.

In the case of *Peter* v. *Union Manuf'g Co.*, 56 Ohio State, 181, the Supreme Court of Ohio was called upon to determine whether a shareholder in a corporation of that state, who had disposed of 1,000 shares of his stock to an insolvent *for the express purpose, as he*

stated of escaping future liability to corporate creditors on account of the shares thus transferred, continued liable for debts of the corporation incurred after such transfer.

The Supreme Court of Ohio held that if the transfer was out and out and the shareholder retained no interest, express or implied, in the stock, then the sale was sufficient to relieve him from future debts of the corporation. The court, in giving its opinion, said:

"If the Circuit Court were of opinion that the transfer of the 1,000 shares of stock to an insolvent member of his family by Mr. Peter, his purpose in the transaction being to escape liability to future corporate creditors, was alone sufficient to continue in him their equitable ownership, and founded their judgment on that view of the question, we think their judgment in this respect was erroneous.

In the absence of a by-law on the subject, and treated simply as property, no reason is apparent for limiting the power of disposition over corporate stock within narrower bounds than those pertaining to other species of property. Under the decisions of this court the owner cannot, by a transfer of his stock, defeat the ultimate right of existing creditors to relief against him. But upon what grounds do future corporate creditors plant their rights to relief against one who had ceased to be a stockholder before their claims arose? If he had, in fact, disposed of his stock, and the stock had been transferred on the books of the corporation, as to such future creditors it was as if he had never been a stockholder. If the transaction was not *bona fide;* if it was a ruse or device by which he sought to hold himself out to the world as devested of his ownership, while by some understanding or agreement, express or implied, the transferee held it for him,—he doubtless would remain the equitable owner, and under the express words of our statute would remain liable to assessment to pay future corporate debts. If, however, the transaction is *bona fide,* and the shares transferred

on the proper corporate books, future creditors are not concerned with the motives which actuated the former owner. It was the right and privilege of such owner to sell to any purchaser who would buy, or to donate to any person who would accept the gift, his worthless corporate stock: and if, in such case, the transaction is completed by a transfer of the stock, persons who thereafter give credit to the corporation have no claim against such former owner. If the sale and transfer are absolute and made in good faith, the former owner does not thereafter remain the equitable owner by reason of the facts that the worthless stock passed, either by gift or sale, into the ownership of an insolvent transferee, and the sole object of the former holder in entering into the transaction was to escape liability for future debts of the corporation. In order to correctly apply these principles to the transfer made by Mr. Peter, the finding of facts should be made certain. It should show whether the sale was absolute, or whether, by some agreement or understanding, express or implied by the circumstances, the transferee held the stock transferred to her for his present or ultimate benefit. Judgment reversed in part and affirmed in part."

In the case just cited the question was squarely presented for decision. The seller of the stock testified that he had sold his stock for the express purpose of escaping liability for future debts. It was held that if the sale was out and out, and the seller reserved no interest in the stock he could not be held for future debts. The case is well reasoned. It is based upon a statute almost identical with the section of the banking act on the same subject.

Whether the liability of a shareholder extends to present or future debts of a bank has not been expressly decided in this court, but in the case of *Stuart* v. *Hayden*, *supra*, page 9 of the opinion, the court practically

intimated that such liability extends only to existing contracts. The court there said:

"Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a stockholder *in respect of its existing contracts, debts and engagements*, if he believed in good faith at the time of the transfer the bank was solvent, is a question which in the view we take of the present case need not be discussed."

In another line of cases this court has held that only creditors who may be presumed to have extended credit to a corporation on the faith of an increase of stock or other stock liability are entitled to base claims thereon. In the case of *Coit* v. *Gold Amalgamating Co.*, 119 U. S., 343, a corporation subsequent to the creation of a debt, increased its capital stock. Six months later the new stock was cancelled, leaving the debt unpaid. A suit was brought to enforce the debt out of the increased stock. This court in its opinion said:

"The plaintiff had placed no reliance upon the supposed paid up capital of the company on the increased shares and therefore has no cause of complaint by reason of their subsequent recall." (347.)

To the same effect is *Bank of Ft. Madison* v. *Alden*, 129 U. S., 372.

In *Handley* v. *Stutz*, 139 U. S., 417, this court said:

"We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders since it is only they who could by any legal presumption have trusted the company upon the faith of the increased stock." (435.)

The principal of these cases is applicable to our contention. Creditors who trusted the bank on the faith of Dewey's connection therewith may look to him when the bank becomes insolvent. But creditors who became

such after Dewey sold his stock out and out and in good faith as between himself and his purchasers and after transfer of the stock was duly registered have no claims against him as they cannot be presumed to have trusted the bank on the faith of a connection which did not exist in fact and which they were bound to know did not exist.

The principle for which we contend is recognized in the case of *Stufflebeam* v. *DeLashmutt*, 83 Fed. Rep., 449, in which a stockholder, who had been defrauded into purchasing his stock and immediately rescinded the contract, was held liable nevertheless to pay his proportion of the assessment necessary to pay debts that were contracted by the bank during the period that he was the owner of the stock. The basis of the decision was the fact that creditors would be presumed to have extended credit upon the faith of his connection with the bank. As to such creditors the court could not relieve him even in case fraud had been practiced upon him.

In *Young* v. *Wempe*, 36 Fed. Rep., 354, the court held that stockholders were liable to be assessed equally and ratably to the extent of their statutory liability *for all debts existing while they held the stock*, and before they made a valid transfer of the same.

If it be contended that a person has no right to deliberately avoid future liability as a stockholder, we reply that this court has expressly held that pledgees of stock may take stock in the name of an irresponsible party without in any way indicating that the stock is

held as collateral and for the express purpose of avoiding liability.

Anderson v. *Philadelphia Warehouse Co.*, 111 U. S., 479.

Rankin v. *Fidelity Trust Co.*, 189 U. S., 245.

The answer of the appellant to our contention is that the theory is fallacious, because succeeding creditors have simply paid off prior creditors and should be entitled to the same rights.

This answer begs the question. It does not meet the proposition that future creditors have no right to trust a bank on the faith of the credit of prior stockholders.

Counsel further answers that voidable transfers are without effect and that the transferrer remains liable to assessment the same as if he had made no transfer. In support of this proposition counsel cite the cases of *Earle* v. *Carson*, *Stuart* v. *Hayden*, *Bowden* v. *Johnson* and *National Bank* v. *Case*. In these cases various transfers by stockholders were held to be void and inoperative, but in no one of these cases was the question here presented for decision decided by the court. The language used in the various cases cited must be held to apply to the facts before the court for decision and to refer to creditors who became such while the shareholder owned his stock.

It was also contended in the Court of Appeals that appellees are foreclosed from contending that they are not liable for all the debts of the bank by the decision of the comptroller in levying an assessment of $86 per share; that such decision is binding upon the shareholders and cannot be disputed. In support of this proposition counsel cited *Kennedy* v. *Gibson*, 8 Wall., 498;

Casey v. *Galli*, 94 U. S., 673; *Sanger* v. *Upton*, 91 U. S., 56; *United States* v. *Knox*, 102 U. S., 423; *Bushnell* v. *Receiver*, 164 U. S., 684; *National Bank* v. *Hawkins*, 174 U. S., 364.

These cases hold that the decision of the comptroller as to the necessity of appointing a receiver, of instituting proceedings against stockholders, and as to the amount to be collected from stockholders is conclusive, inasmuch as all such questions are matters within his judgment and discretion. The principles laid down in these cases are too well settled to be controverted, but in none of the cases cited was it held that the comptroller has the right to determine what stockholders are liable to assessment, or to determine who are stockholders for the purposes of assessment.

In the case of *Bank* v. *Hawkins*, *supra*, this court said:

"The Comptroller's act, in ordering the assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted."

The distinction between the cases cited by counsel and the case at bar lies within the sentence just quoted.

The comptroller has no jurisdiction to determine what are the judicial rights of stockholders in the matter of the assessment. A stockholder can show, in a suit brought by the comptroller, that he has transferred his stock in good faith and done everything necessary to have it transferred on the bank's books, and therefore is not liable to assessment, although his name appears on the books.

If it is the law, that a stockholder, who transfers his shares out and out, is not liable for future debts of the bank, certainly the comptroller cannot determine that he is so liable. This question is as much a judicial one, for the determination of the courts, as is the question whether the stockholder is liable at all. With such questions, which are judicial in their character, the comptroller has nothing to do. In this connection the decision of the United States Circuit Judge, in the case of *Moss* v. *Whitzel*, 108 Fed. Rep., 579, clearly presents the question involved. In discussing the various cases last mentioned the court said:

"These rulings go no further than what the language implies, and the language must be restrained to the subject-matter under consideration. The sense is, that whether or not an assessment on the stockholder shall be made, and the amount thereof, in the first instance, are solely matters of administrative policy and determination and are addressed to the discretion of the comptroller. But the Supreme Court has not held that a stockholder, when sued by the receiver, is precluded from defending on the ground that he is not a stockholder, or that he owes nothing as such stockholder, or that there is in fact no debt or obligation of the bank existing at the time of the suit against the stockholder. If this defense is not permitted to the stockholder when called upon to pay an assessment based upon such judgment not conclusive against him, when, where, and how is he to find relief from the unjust exaction demanded of him? He has not hitherto had his day in court. He had no hearing before the comptroller prior to the assessment. The statute makes no provision for such hearing before the comptroller. The comptroller acts upon reports laid before him by the receiver respecting the liabilities of the bank and its assets. On this *ex parte* showing he decides as to the necessity and amount of the assessment. This action of his is not reviewable. If the stockholder when sued by the receiver stands mute and suffers judgment to go by de-

fault, has he not had his day in court? Could he pay the judgment against him, and then have any standing anywhere in court to restrain the receiver from paying over the fund to the judgment creditor of the bank? It is said that the statute provides that, if there is any surplus in the hands of the receiver after the debts of the insolvent bank are paid, it would go back, *pro rata*, to the stockholders who paid their assessment. This would afford very little consolation to the stockholder after the money collected from him had been paid over in satisfaction of the debt for which the stockholder is not in law and conscience bound. On the other hand, the receiver (so says the Supreme Court) 'represents both the creditors and the association.' *Kennedy* v. *Gibson*, 8 Wall., 506; 19 L. Ed., 476. And therefore the judgment against him in this action would conclude him both as to the receiver and the creditor. *Cromwell* v. *Sac. Co.*, 94 U. S., 351; 24 L. Ed., 195. It seems to me that, to sustain the contention of plaintiff, the court must read into the statute not only that Congress intended that the comptroller should be the exclusive judge as to when an assessment on the shareholders should be made, and the amount thereof, but that he is also so far clothed with judicial functions as to conclude the shareholder from contesting the fact as to the validity or existence of any liability which the property of the shareholder is taxed to pay. This would carry the representative character of the receiver beyond what the Supreme Court has said,—that he represents the creditors and the association,—by holding that he also represents the shareholders, when called upon to pay the assessment. It seems to me that this would overturn the maxim that every man is entitled to his day in court, and would violate the fifth amendment to the Federal Constitution, in depriving the shareholder of property 'without due process of law.' While the phrase 'due process of law,' as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him 'to be present before the tribunal which pronounces judg-

ment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.' *Holden* v. *Hardy*, 169 U. S., 366."

The question which we are now discussing was not passed upon in the majority opinion of the Court of Appeals. They held that in the view taken by them of the case it was not necessary to "cast even a curious glance" at the proposition. (Rec., 296.) The matter, however, was discussed by Judge Grosscup in his dissenting opinion. (Rec., 303.) He recognized apparently that it is indefensible to hold a shareholder for debts incurred after a *bona fide* transfer of his stock. He held, however, that the measure of liability should be not a *pro rata* share of debts existing at the time of the transfer, but a *pro rata* share of the difference between the bank's liabilities and its assets at the time of the transfer. In regard to this contention, it is evident that it is practically impossible of application. While it is easy to determine a bank's liabilities upon a given date, to determine some years later what its assets were upon the same date is a matter of extreme difficulty. It would involve in each case a full accounting and a full showing as to the financial responsibility of each debtor of the bank; a matter which would afford ground for much speculation, but upon which little exact and satisfactory information could be obtained.

Judge Grosscup's theory was based on the proposition that the creditor who deposited his money in the bank the day after Dewey sold his stock is equally in-

terested in his liability to pay debts, because he has the right to rely upon the fact that in the hour of Dewey's withdrawal as a stockholder, the assets were more than equal to the liabilities, or in case of a deficit that the stockholders would be subject to call to make up such deficit.

This, of course, assumes the whole question in controversy. Has such a creditor the right to rely upon the liability of a former stockholder? Has he a right to rely upon any such stockholder making up a deficit except to creditors who had trusted the bank upon the faith of his being a stockholder? We submit that he has not, for the reasons given.

This brings us to a consideration of the debts and liabilities for the *pro rata* share of which Dewey's estate should be held.

The amount of these claims was agreed upon by stipulation in the Circuit Court. The stipulation is found upon page 258 of the record. These claims are set out in the decree of the court (Rec., 276), and amount to the sum of $11,930.21. Dewey's full *pro rata* share of these debts upon his 105 shares would be $2,505.30. If he were assessed only on the basis of $86 a share he would be chargeable with 14 per cent. less, or $2,254.56. The court found, however, that Dewey was not liable for certain of the claims included in the above amount. The finding of the court on this proposition is found on pp. 276, 277 and 278 of the record.

HARLAN COUNTY DEPOSIT.

The finding of the court on this transaction was as follows:

"The court finds as to the above claim of Harlan County, Nebraska, for $4,429.72, that at the time Dewey sold the stock in question there was on deposit in said bank in the name of E. G. Whitney, treasurer, $4,319.57. That afterwards, in May, 1896, the balance of this account then on hand was paid over in cash to said county treasurer's successor in office, D. A. McCullough, and by him redeposited in said bank. That this amount of $4,319.57 was added to and drawn from time to time, the deposit reaching at one time over $10,000, and at one time receding to $4,004.76. It is claimed by said successor D. A. McCullough that the bank required him to redeposit the money in said bank before paying him the money. There is, however, no evidence to show that Charles P. Dewey had any knowledge whatever of this transaction. The court finds that as to this item there was such an absolute novation as to release Dewey."

Pages 259, 260 and 262 of the record contain Mr. McCullough's testimony. It appears that the county money deposited in treasurer Whitney's name was not protected by any bond. In the meantime the bank had given a bond to Harlan County under McCullough's term, and the county authorities were anxious to have the money paid over by Whitney, who had deposited it without authority, and then have McCullough redeposit it, so that it would be deposited under the terms and protection of a depository bond authorized by a new law of the state. (See p. 261 of record, McCullough's testimony.) There was a complete novation for two reasons.

First: The account, after Dewey sold his stock, ran

up to $10,000; the money was deposited and checked out, and the debt that the bank owed the county when Dewey sold his stock could not, by any principle of law, be identified as the same debt that the bank owed the county when it closed its doors two years and five months thereafter.

Second: The debt of the bank to the county was afterwards paid over in cash to the new treasurer, and by him redeposited under different conditions and different security.

As said before, for two reasons we contend that the indebtedness existing when Dewey sold his stock was extinguished long before the failure of the bank.

This was an open account, subject to check. New deposits were constantly being made, and new checks constantly drawn upon the same. When Dewey sold his stock there was $4,275.32 on deposit. Subsequent deposits swelled the deposit to $10,318.43 about ten months later, notwithstanding the amounts that were checked out in the meantime. When the bank failed the deposit was reduced to $4,004.67, the same being $6,313.76 less than in November, 1895. Under rules of law too familiar to require the citation of authorities, the debt oldest in point of time was first paid by the checks first drawn. If no checks had been drawn against the deposit prior to November, 1896, when the deposit reached $10,318.43 and had the original deposit been part of that amount, still the checks for the $6,313.76, paid therefrom, would first have drawn out and paid the $4,275.32 on deposit when Dewey sold his stock. Can a court indulge in the conclusion that of the $10,318.43 on deposit in November, 1896, only that

money was withdrawn which was deposited after Dewey sold his stock? And that the money on deposit when he sold his stock remained intact, undisturbed by all the depositing and checking out that was going on for about two years and a half, and which reduced that $10,318.43 to $4,004.67?

Then again the old Whitney deposit was actually raised by Burton and paid to Whitney, and by Whitney paid over to McCullough, the new treasurer, in formal and official extinguishment of the debt as far as treasurer Whitney was concerned, and this took place more than a year after Dewey sold his stock; this transaction released C. P. Dewey from all liability as former stockholder. It is true that the bank was as much indebted afterwards, as it was before this transaction, but the character of the debt had changed. By advice and instructions of the county board, treasurer McCullough had received the cash from Whitney and from the bank, and then redeposited the money under a new bond which the board had approved and regarded as good. The moment that money was paid over to McCullough, the new treasurer, the old debt was extinguished, and so was the liability of all persons connected with it. When the money was redeposited with the bank there was created a new liability, a new debt binding the bank, and all who were connected with it at the time, especially the persons who were on the new bond. For the two reasons given, we claim that Dewey was released from all liability for the Harlan County deposit.

The Circuit Court also held that Dewey was not liable for the claim of A. B. Dewey, amounting to $2,942.16. The finding of the court as to this claim was as follows:

"As to the above claim of A. B. Dewey on certain certificates of deposit amounting to $2,942.16 the court finds that said A. B. Dewey was a stockholder in said bank for an equal amount with said C. P. Dewey during the period that C. P. Dewey was a stockholder. That said A. B. Dewey was a director of said bank from January, 1892, to January, 1895; that after C. P. Dewey had sold his stock, said A. B. Dewey took from said bank certain assets of the bank as collateral security for said certificates of deposit held by him and on which certificates this claim is made; that no accounting has been made or shown in this case as to said assets so taken as collateral security to said certificates; that the receiver, complainant herein, has compromised with said A. B. Dewey as to his stockholder's liability in the matter of said bank. The court finds as to this claim that the said Charles P. Dewey is not liable."

This finding is amply sustained by the evidence in the record. (Randall, p. 65; M. F. Burton, p. 138; A. B. Dewey, p. 161.)

The court also excluded from the claims for which Dewey was held liable his own claim of $2,590.66, on the ground that there was no reason to collect from Dewey to pay his own claim. (Rec., 278.)

In the case of *Wick National Bank* v. *Union National Bank*, 62 Ohio State, 446, it was expressly held that an assessment collected from stockholders who were held liable to pay certain specific debts incurred while they were stockholders should be divided *pro rata* among such debts. Under this decision Dewey would have been entitled to have paid on his claim a *pro rata* share of the amount collected from himself. In view of this fact the court's ruling that it would not collect from Dewey to pay his own claim was clearly right.

This left claims existing at the time Dewey sold his stock and which were unpaid at the date when the re-

ceiver was appointed, amounting to $1,967.67, with interest from September 14, 1897, the date of the comptroller's assessment.

We respectfully submit that if Dewey's estate is held liable at all its liability should be limited to a *pro rata* share of this amount in accordance with the original decree of the Circuit Court.

V.

THE SALE OF THE TWENTY-FIVE SHARES NOT TRANSFERRED ON THE BOOKS OF THE BANK SHOULD HAVE BEEN SUSTAINED BY THE COURT OF APPEALS.

The Court of Appeals directed a decree against Dewey's estate for the full assessment on twenty-five shares. From this portion of the judgment of the court Dewey's executors have prayed a cross-appeal, and have assigned cross-errors in this court.

The evidence shows that this stock was delivered to the purchasers, with a power of attorney attached properly executed. At the time Dewey resided in Chicago and the stock was transferable on the books of the company in Nebraska. It would not be reasonable to require Dewey to go to the bank personally and see that the stock was transferred on the books. He gave the purchaser a power of attorney and subsequently wrote to the bank stating that he had sold all of his stock. (Rec., 49.)

Upon the authority of *Whitney* v. *Butler*, 118 U. S., 655, and *Earle* v. *Coyle*, 95 Fed. Rep., 99, we contend that Dewey did all that was reasonably necessary under the circumstances to give notice of the transfer of the

stock, and that he should be relieved from liability thereon.

In any event he should not be held liable on these shares for more than his *pro rata* share of the debts existing at the time of the transfer and remaining unpaid when the bank failed. After he made the transfer he ceased to be the owner of the stock. It is true that the stock still stood on the books in the name of Jewett, but as between Dewey and the purchaser, Jewett was no longer Dewey's agent, but the agent of the purchaser. Persons dealing with the bank after the date of the transfer would not have found Dewey's name on the list of stockholders. They would not have been misled into believing that he was a stockholder. The fact that stock stood in the name of Jewett would simply have put them on inquiry as to whom he represented. Inasmuch as the bank and its officers were informed that he no longer represented Dewey inquiry at the bank would have disclosed to any person seeking knowledge that Dewey no longer had an interest in the stock.

While creditors who had dealt with the bank while Jewett represented Dewey as his agent might have been entitled to have the stock transferred of record, creditors dealing with the bank after the actual transfer of title could not have been misled into believing that Dewey was the owner of stock by finding stock on the record in the name of Jewett.

For this reason it is only creditors who dealt with the bank prior to the sale of the twenty-five shares in question who can claim any rights by reason of the fact that the stock was not transferred of record.

Before concluding the argument we again call the attention of the court to the fact that in the Circuit Court the appellant took a decree for the entire amount of his claim against the transferrees of Dewey. (Rec., 274.) This action was inconsistent with the theory of appellant's bill. The bill alleged that the transfers by Dewey were void and the prayer of the bill was that they should be set aside "and the title to said stock be vested, both in fact as well as on the books of the bank in the name of the said Charles P. Dewey." (Rec., 238.)

We contend that by taking a decree against the transferrees the receiver has elected to ratify the sales made by Dewey and that this election amounted to an abandonment of his claim against the vendor of the stock.

In the case of *Morrill* v. *Crawford*, 51 Neb., 287, this question was presented for decision. In that case the prayer of the bill was in the alternative, that the transfer be set aside or that the receiver have a decree against the purchaser. The Supreme Court of Nebraska held that by taking a decree against the purchaser the receiver had made an election which was binding upon him, and that he could not also take a decree against the vendor.

In conclusion we respectfully submit that upon the record in this case the appellees are entitled

First: To have the judgment of the Court of Appeals as to eighty shares of stock affirmed.

Second: On the cross-appeal to have the judgment of said court as to twenty-five shares reversed and to have a decree relieving the executors from liability.

Third: If the executors are held liable, to have the

amount of their liability limited to a *pro rata* share of the debts existing at the time of the sale, and which remained unpaid when the receiver was appointed. Their *pro rata* share should not exceed one hundred five five-hundredths of the amount of such debts.

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